



TILBURG UNIVERSITY

**INTERNATIONAL BUSINESS LAW MASTER
THE ROLE OF ARBITRATION IN COMPETITION LAW**

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ABSTRACT

First of all, we are all living in an ever globalizing world. In other words, the world we live in is globalizing at an incredible pace. As a result of this, commercial race has become a harsh competition than ever. Therefore, arbitration in international commerce has become a desirable method through the world. The reason for is that arbitration is an independent and open way, put into practice by experts choosen by the parties and brought into the end in a fast way.

The U.S. is the leading country about the arbitrability of competition law related subjects. Progressions in the U.S. especially the second look doctrine has effected the E.U. competition law as well and with help of the comparative analysis it will be shown how arbitrability of competition law disputes are viewed in the U.S. and E.U.

In this context, this paper will adress the essential legal grounds of arbitration in the U.S. and E.U. Hence, legal frame in the U.S. and E.U. regarding arbitration will be discussed first and afterwards the coverage of arbitrability and the courts decisions about arbitration in terms of competition law will be analyzed.

This study shows what kind of problems may occur in the commercial world relating to competition law. Thus, this study proposes a functional approach to solve the competition law disputes with using arbitration procedures. In that regard, this thesis will focus on the term of arbitrability and indicate what kind of advantages arbitration has in competition law disputes for the parties.

INTRODUCTION

*“Of all mankind’s adventure in search of peace and justice, arbitration is among the earliest. Long before law was established, or courts were organized, or judges had formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes”*¹.

The first vice president of the American Arbitration Association, Frances Kellor expresses the arbitration as quoted above in his 1948 dated book where he tells the historical development of arbitration and the way of application on that time which was met with great interest; and Missouri Law Journal in April of the same year devoted its issue to a symposium on arbitration². When you go back even further, it is seen that in 1786 one of the first arbitration committee formed under the New York Chamber of Commerce³. On the other hand, the date of international arbitration in the modern sense extends to 1794 “Jay Treaty” which is signed between United States and the United Kingdom⁴, wherein the said agreement has been the source of 1872 Alabama Agreement and with the agreement, commercial arbitration has gained an international dimension next to national qualifications⁵.

In the historical development of arbitration, it was previously seen as an alternative to the traditional trial. However, this approach has changed over time and the increase in the volume of international relations and trade, widespread adoption of arbitration has been the driving force literally. Today, arbitration is not considered as subsidiary or alternative to the court but as separate judgement system operating along with the court. The most important outcome of this; unlike alternative methods of dispute, arbitration is binding and more importantly, represents the final judgment (*res judicata*). The thing which is important in terms of our subject is that what kind of contributions do arbitration judgement have in terms of competition law.

The use of dispute resolution of arbitration and mediation, to resolve commercial disputes with a competition component has increased rapidly in recent years. This interaction between arbitration and competition law has encouraged a energetic debate amongst academics and practitioners and has led to interesting jurisprudential developments⁶.

This study proposes a general view of the E.U. and U.S. competition laws and their connections with the arbitrability. Also, it proposes an useful approach to choose why international commercial arbitration is necessary and useful for the parties. In that sense, this study will recommend that if the competition law policies of states connected with a dispute serve opposing and conflicting goals, the arbitration has many benefits to solve the possible issues.

In line with this abovementioned explanation, the main question of this thesis is to find an answer for the following question: what is the role of arbitration in competition law and what are its benefits in the light of U.S. and E.U. law systems? The main reason for this question is that the world is more global than ever at the present time and arbitration has an undeniable important role for competition law conflicts today. Hence, this study will explain the U.S. and E.U. arbitration systems and regulations to the parties to understand clearly and

¹ Frances Kellor, “American Arbitration: Its History, Functions and Achievements, New York: Harper and Brothers”, (1948), p.3.

² Ludwig Teller, “Arbitration”, *Annual Survey of American Law*, Vol. 1948, Part Four (1948), p. 901-914.

³ D. Frank Emerson, “History of Arbitration Practice and Law”, *Cleveland State Law Review* 19, (1970), p. 156.

⁴ The respective agreement is seen as the beginning point of the modern international arbitration (Alford, R. “The American Influence on International Arbitration”, *J. On Disp. Resolution*, 19 Ohio St.69, (2003), p. 72.

⁵ In the modern sense, international commercial arbitration’s beginning as a trial method dates back to the older times.

⁶ OECD, “Arbitration and Competition, related to a hearing on Arbitration and Competition”, *Working Party No.3 meeting of 26 October 2010*, overview, available at: <http://www.oecd.org/daf/competition/abuse/49294392.pdf>

guide the parties who want to use arbitration clause in an accurate way in their agreements. Also, this study will state the different approaches to the arbitrability and doctrines in order to compare and see the conflicts in literature and different law stages. So that, it will enlighten the different considerations in arbitrability in competition law.

This study focuses on these issues:

- What is the framework of arbitrability in competition law?
- What are the regulations of arbitration in competition law and its use of practice in U.S. and E.U. law systems?
- What are the stages of arbitrability disputes in competition law?
- What kind of approaches have U.S. and E.U. law systems to the arbitration disputes?
- What is the importance of second look doctrine?
- What are the possible issues of arbitrability in E.U. competition law?
- What are the benefits of arbitration in competition disputes?
- What should the parties take into account to make an accurate arbitration agreement in respect of competition disputes?

Today, progress in arbitration as a method of dispute resolution, is shaped in line with interior regulations and court practices of countries. Accordingly, in the study, in the first chapter, the definition of arbitration will be explained. In the second chapter, general legal framework for arbitrability and its appearance in competition law will be drawn up, then in the third chapter, regarding the United States and the European Union, application of competition law in terms of the arbitration process and application examples will be discussed. In the fourth part of the study, competition disputes and commercial arbitration will be mentioned. As follows, in the fifth chapter, the different issues in competition law regarding to arbitration will be told. As conclusion, in the last chapter, taking the conclusions from comparative law into account, it will be mentioned about the conclusion and focus on the question that why should the parties choose the arbitrability in possible competition law disputes and what should the parties take into account when they deal with arbitration agreements.

CHAPTER 1: Definition

Common law authors have defined arbitration as: “two or more parties faced with a dispute which they can not resolve themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course, it will not be settled by a compromise, but by a decision”⁷.

Arbitration is a private way to solve the problems. That is why, arbitrators differ from judges that they have the authority to settle the law but not the power to apply it. The expenditures of the dispute are compensated by parties. Arbitration is mostly used for the commercial disputes between the parties. Arbitration has also a distinguished feature that it serves the possibility to solve the disputes between the parties in a quick manner. Besides, arbitration can be both international and institutional or ad hoc.

There are some advantages of arbitration before the process of resolving a dispute in court. Firstly, arbitration allows the parties more flexibility over the legal process. So that, they can choose the arbitrator with their own will. Also, arbitration provides a faster process to solve the issues between the parties than the classical court process. Besides these, arbitration can provide a wider enforcement of decision than the current applicable law.

On the other hand, there are also some disadvantages of arbitration before the process of resolving a dispute in court. Firstly, arbitration has not the rigidity as public enforcement of competition law. Moreover, parties have no some obligations such as presenting documents. Furthermore, there is not enough openness during the arbitration process. Also, there can be conflicts with the decisions of two different arbitrators or with a competition authority. Finally, the previous versions of the disputes which are already solved by an arbitrator are not registered and this may cause different approaches to competition law⁸.

During the process of temporary arbitration judgement, a portion of the arbitration procedure, pursuant to predetermined rules / laws which are penned or referred completely by the parties (and which is usually determined by institutional arbitration), takes place under the control of the referee with the consent of them or parties⁹. Institutional arbitration in the arbitration court is being implemented by organizations which have rules governing arbitration proceedings in detail and technical/administrative organizations to apply these rules. Today, there are lots of institutional arbitration centers around the world some part of which are created by organizations under bilateral and multilateral agreements concluded between states (ICC, AAA, etc.), some are chambers of commerce and industry at national level (İstanbul Chamber of Commerce) which are constituted by universities and institutions¹⁰.

⁷ Alan Redfern and Martin M. Hunter, “Law and Practice of International Commercial Arbitration “, (1991), p.3

⁸ OECD, Hearings, Arbitration and Competition 2010, p. 8.

⁹ In order to help the ones, who prefer this arbitration, to maintain their arbitration activities in the frame of international quality rules, UNCITRAL developed a range of arbitration rules in accordance with the law no 31/98, in its general assembly on December 15, 1976. For the 2010 revision of these rules see also: www.pca-cpa.org/showfile.asp?fil_id=1724 (access date: 22.04.2014).

¹⁰ The main institutional arbitration centers that carry the arbitration of the arbitrators in Turkey are Istanbul Chamber of Commerce Arbitration Court and Turkish Union of Chambers and Exchange Commodities Arbitration Court located in Ankara.

CHAPTER 2: The Arbitrability and Its Appearance In Competition Law

2.1 Concept of the Arbitrability

The principle of "freedom of will of the parties" in arbitration procedure, by leaving out the judgment of the national court system (opt-out), it gives them the possibility to resolve disputes through arbitration¹¹. However, freedom of party wills also have some limitations.

Nowadays, when the regulations of national law are viewed, it is seen that all disputes are not suitable to arbitration and states separate some of the issues related to arbitration with "red lines". In fact, the greater the intervention of states in arbitral proceedings¹², the lesser favorable areas to arbitration¹³. However, in recent years in many countries, the number of areas where national legislation favorable to arbitration quickly increased and it is seen that in some countries apart from some limitations, arbitration become free. On the other hand, for the arbitration to maintain its validity from the beginning of the trial process to the fulfillment of decisions depends on the validity of arbitration agreement. For these reasons, regarding the conditions of validity of the arbitration agreement from the beginning, it is necessary to clarify the concept of arbitrability.

It is focused on two basic criteria for arbitration agreement to be valid in accordance with the consent between the parties and in a lawful manner. The first of these criterias the "subject" meaning that subject-matter of an arbitration agreement must be resolvable by arbitration; this is called "objective arbitrability". The other is used to indicate who is authorized to submit their dispute to the arbitration which this condition is called "subjective arbitrability"¹⁴.

The concept of arbitrability is used sometimes in a broader scope. For example, the U.S. Supreme Court's 1995 decision in *First Options & Kaplan*¹⁵. So, it can be said that in U.S., the concept of arbitrability, in a wider sense compared to other countries, is used as to include the scope and validity of the arbitration agreement¹⁶. However, in order to avoid confusion, in the terminology of both national and international arbitration, the arbitrability should be limited in the sense of being objective and subjective.

In the field of cross-border rules relating to international arbitration in which the text of the international conventions, to give a general description about convenience to arbitration is seen to be avoided. For example, prepared by UNCITRAL, revised in 2010 in the Model Law, the convenience to arbitration is unspecified; however, in paragraph 5 of Article 1, each state is given the right to arrange arbitrability in domestic law issues. Similarly, the United Nations New York Convention, which is the most important regulation on international trade and arbitration¹⁷, there is no regulation for arbitrability; only each state is given the right to arrange arbitrability in domestic law issues by courts. At this point, regarding criteria used in national legislation in terms of arbitrability, it is possible to group them in the following way:

¹¹ Alexis Moure, "Arbitrability of Antitrust Law from the European and US Perspectives", Kluwer Law International, (2010), p.5.

¹² The intervention process there starts after the demand of the judgement's cancellation of one side when their arbitration judgement results turn out to be in the wrong.

¹³ According to Carbonneau, the convenience to arbitration draws the line between the point where the freedom of agreement ends and the common quality of arbitration authority. Carbonneau, T. F., "Arbitrability: International and Comparative Perspectives", Kluwer Law International, (2009), p.143.

¹⁴ The convenience to the subjective arbitration is largely related with whether it is authorised to solve the disputes in government or public attempts or not in doctrine, and is excluded from the extent of the research (Fouchard, Galliard, Goldman, "on International Commercial Arbitration", Kluwer Law International, Boston, London.(1999), p. 313). In the following part of the research, the statement of the arbitrability will be used just to define the objective arbitrability (in term of subject) to arbitration.

¹⁵ First Options of Chicago, Inc. v. Kaplan (94-560), 514 U.S. 938 (1995).

¹⁶ To reach more detailed information about the extent of the convenience to arbitration in USA see also: Mistelis and others Arbitrability: "International and Commercial Perspectives", 2009, in Shore (2009), The United States Perspective of Arbitrability chapter 4-2.

¹⁷ According to the convention, the foreign arbitrator decisions are binding the agreement countries. The contracting countries are obligant to perform the decisions of the foreign arbitrators in accordance with their own laws.

- Only the provisions about disputes subject to settlement agreement being arbitrability,
- Only the provisions that allow to apply arbitration in the issues of free will,
- The provisions that regulate dispute areas which may or not be subject to arbitration with the method of *numerus clausus*.

The criteria of being convenient to compromise before the establishment of reform on arbitrability in German law, is also seen today in many other countries. Belgium¹⁸, Spain¹⁹ and Italy²⁰ can be shown²¹ among these countries.

In French law, it is accepted that; it can be referred to arbitration on the issues where everyone is able to dispose and in general, the issues that concern the public order may not be appealed to arbitration. On the other hand, there is no distinction according to the dispute in terms of being limited to domestic law or having international qualification. Accordingly, the application area of arbitration should be expanded by forefront of the scope of "international public order" in disputes of international qualification unlike the domestic law.

Apart from all these criterias, it can be said that the most developed understanding is "*criteria of assets*" on the subject of being convenient to arbitration. Concept of all demand types about assets in Swiss Private International Law Act article 177²² is accepted as the system that minimizes the limits of subject of convenience to arbitration. The referred system had been an origin to the amendments made in German Civil Procedure Code and by propelling a provision saying that demands not related to assets also be resolved by arbitration to the extent that convenient to compromise, it is gone a step further and special provisions in other laws relating to the convenience of arbitration rights are reserved.

Another concept closely related to the arbitrability is the "public order" concept²³. However, public order is not the same thing with arbitrability; it is also a factor like arbitrability which may limit the sides freedom. Public order in fact is one of the problematic areas which can limit the will of parties with arbitrability. Some conflicts are so sensitive to public order that, it is accepted that disputes arise from these issues should be resolved under the jurisdiction of state courts (for example, disputes arising from the criminal law). It is seen that, the concept of public order does not have a definition made in legislation of national or international law.

2.2 Arbitrability in Competition Law

It is seen that arbitration and competition law is essentially two disciplines which are very different from each other although some issues worth mentioning that these two fields

¹⁸ Belgian Judicial Code Art. 1676(1).

¹⁹ According to Spanish Arbitration Law, the subjects which parties can freely dispose on, are convenient for arbitration. The inconvenient subjects for the arbitration are counted in the form of catalog.

²⁰ Italian Code of Civil Procedure Art .806.

²¹ According to Austrian Law of Civil Procedure, the criteria of the convenience to arbitration is envisioned for the disputes whose matter is not related with money, and in the law with the change made in 2006, it is possible to make an arbitration agreement in the disputes related with wealth. Similarly, in the private law systems, the limits of the convenience of the arbitration are the issues on which the parties cannot dispose freely.

²² Switzerland's Federal Code on Private International Law (CPIL), Art. 177.

So it is aimed that all kind of disputes related with any kind of demands except from wealth should be solved by Swiss National Courts. (Brekoulakis, S., "*Law Applicable to Arbitrability: Revisiting the Revisited lex fori* ", *Queen Mary University of London, School of Law Legal Studies Research Paper*, (2009), p.102.

²³ According to Poudret, the relation between public peace and convenience of arbitration is complicated. Moreover, the public peace is an obstacle for the convenience of arbitration. (Poudret J.F., Besson S., Berti S. and Ponti A., "*Comparative Law of International Arbitration*", *Sweet& Maxwell*, (2007), p. 343).

complement each other to the extent. Competition authorities restrict competitive behaviours in the market while providing public benefit; arbitration exists as a hybrid system to merge the interests of private law with the public interest.

Competition authorities are tasked with protecting the competitive environment in the market as a final goal and thereby serve the public interest. On the other hand, although arbitration is a kind of judicial system that will of parties are superior, these judges carrying out the trial are obliged to comply with the competition in the relevant laws and regulations concerning private intrusive or prescriptive rules relating to public order as a final goal. Thus, while delivering a judgement in arbitration proceedings, which is in accordance with the principle of equity, with the qualification of exact provision, subject to certain formalities and ,with possible to execution; the public interest should be protected as well²⁴.

Essentially, in the target of arbitration, a market economy with free competition and trade exist. Today, it is possible to see the effects of a broad interpretation of the scope of arbitration availability of its ongoing trends also in the field of competition law. Appearance of the arbitral proceedings in the competition law has a dual structure as:

- Arbitration where individuals (arbitrator) or arbitration agencies apply competition law as private law enforcement,
- Arbitration as a tool to assist competition authorities by public law practice

The application of the arbitrator often serves to transfer the damages given by the party which violates the rules of competition law in an *ex post* (successor) way. And in the application of the competition authorities (for example, conditional on the decision to allow the merger to be included in the arbitration clause), arbitration serves as *ex-ante* (predecessor)²⁵.

Competition authorities were initially wary to arbitration with the concerns that enterprises may use it to avoid competition rules or referees in the domestic legal provisions may eliminate the mandatory rules. In this approach, the arbitration having unique rules such as privacy and providing superiority to will of parties have been effective. However, today, primarily defense brought to this approach is; if these rules in domestic law not taken into consideration due to its unique nature, it would prevent the enforceability of the judgment as a result of the trial; by this way, the development and dissemination of the arbitration process will be damaged and judgement which bring such a result would not be desirable by referees. At this point, due to the flexibility, confidentiality and impartiality of the method of arbitration, the preference rate against the court proceedings is increasing.

Adoption of the method of arbitration proceedings in terms of disputes arising from breach of competition has first appeared in the United States and in later years, with the process of modernization of competition law in E.U. countries and Switzerland with claims arising from disputes to arbitration in some aspects has been considered favorable.

Development of arbitration practice in competition law plays an important role in terms of some structural differences exist in the two legal systems and arbitration practice and scope of this phenomenon directly affects the results. In the next chapter, respectively, U.S. and E.U. law practice in arbitration will be described on the basis of availability in the nature

²⁴ So, especially in the decisions of the EU Commission's conditional union permissions, the function of public welfare in arbitration judgements gains density. As will be mentioned in detail in the following part, the arbitration judgement in conditional permission decisions have a function to protect the third parties' welfares which are affected from the processes held by the commission, and observe the welfare balance among the third parties. According to Idot, the arbitration mechanism in conditional permission decisions assumes to be an assistant to the authorities in the extent of public law applications while departing from private law. (Idot-OECD 2011, 67).

²⁵ OECD, "Arbitration and Competition, related to a hearing on Arbitration and Competition", Working Party No.3 meeting of 26 October 2010, p. 11, see also: <http://www.oecd.org/daf/competition/abuse/49294392.pdf> , (2010), (access date: 21.04.2014).

of the building blocks of arbitration decisions; in the mentioned law systems, arbitration results will take place in the application areas of competition law.

2.3 Arbitrability of Competition Law Claim

The concept of arbitrability concerns the issues if a specific issue like competition law claim can be related to arbitration. The issue of arbitrability can appear in different stages. First of all, a party can appeal whether the issue is arbitrable. In this situation, the arbitrator should make a conclusion about this request. Secondly, a party may raise an objection in regard to arbitrability during the jurisdiction of the state court based on the arbitration clause.

National competition law claims are mostly arbitrable in E.U. countries. On the other hand, there are still some restrictions. This restrictions should not be ignored by the arbitrator. Beside this, the actions of the arbitrator is restricted in specific matters in E.U. by the Commision. However, the courts have accepted the arbitrability of antitrust claims, the area of these claims are not stil obvious.

2.4 Applicable Law

The arbitrator is responsible for choosing the mandatory rules of a concrete law system to reach a conclusion about the presented issue. There are three systems if an issue is arbitrable or not: *lex contractus*, the *lex arbitri* or the law of the country enforcement. The New York Convention has not stated any point about this distinctions.

The arbitrator should apply the mandatory rules freely instead of considering conflict of law analyses and condition of the cases. Because, conflict of law approach is sometimes useless that deciding of a particular legal system is not workable. On the other hand, the law of the place of arbitration of competition law is not always suitable, because, execution and the center of the parties are not located there.

Thus, when an arbitrator should decide an applicable competition law, the arbitrator should implement a functional approach to determine the applicable competition law. The arbitrator should keep in mind the mandatory rules of competition law and its results of application and non-application.

CHAPTER 3: The General Competition Concept and Arbitration in the E.U and U.S. Competition Systems

Due to the characteristic differences between the two law regimes, it may happen conflicts between the two regimes. U.S. system is mainly based on the consumer welfare and it depends on the minimize consumer welfare losses. On the other hand, E.U. system is initially interested in market integration and its primary goal is eliminating the barriers between the member states.

3.1 Arbitration in the U.S. Competition Law

Judicial localities in the U.S. have adopted an opposing attitude towards arbitration during the Industrial Revolution. Until the 1920s, U.S. courts saw arbitration as an opponent of public order and denied arbitration proceeding with the worry that it would be an intervention to their very own jurisdiction. However, U.S. Senate ratified Federal Arbitration Act (FAA) in 1924²⁶ and encouraged arbitration as a method of resolving disputes despite the contrary attitudes of courts towards arbitration. Supreme Court used the expression “national policy that ratifies arbitration” for the law mentioned in *Southland*²⁷ verdict.

A milestone in the use of arbitration in international agreements that involve businesses of the U.S. was reached in 1970 when the New York Convention became acted by the addition of Chapter 2 to the FAA. In 1990, the Federal Arbitration Act was widened by the enactment of Chapter 3 of the Act, the Inter-American Convention on International Commercial Arbitration²⁸. The United Nations Commission on International Trade Law adopted the UNCITRAL.

Model Law on International Commercial Arbitration in 1985 and as modified in 2006. According to UNCITRAL. The Model Law is designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitrations. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world²⁹. The UNCITRAL Model Law is not binding, but states may approve it by combying it into their domestic law³⁰.

Today, FFA is the fundamental law which regulates commercial arbitration in the U.S. The aforementioned regulation includes all subject- matters that influence trade and all arbitration proceedings regulated with respect to a written arbitration treaty³¹. In addition to the aforesaid regulation, states have made their own legal regulations eligible to international arbitration³², and some states have adopted international regulations such as UNCITRAL

²⁶ The provisions in FAA also appear in chapter 9 of United States Code (USC).

²⁷ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

²⁸ Steven A. Certilman, “*This Is a Brief History of Arbitration in the United States*”, (2010), p.12.

²⁹ UNCITRAL, 1985 – UNCITRAL Model Law on International Commercial Arbitration, see: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html , (Access date 19.04.2014).

³⁰ See UNICTRAL, Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

³¹ Reuben, R. C. “*Personal Autonomy and Vacatur After Hall Street*”, *Penn State Law Review*, Volume 113, (2008-2009), p. 1105. In Chapter 1 of FAA, applicability conditions of arbitration agreements and verdicts are regulated. In Chapter 2, provisions parallel to provisions of New York Convention which enabled the participation of USA in international arbitration implementations appear. Chapter 3 includes Panama Convention.

³² For generality- speciality relationship between arbitration laws of the states and FAA and discussions on its results see : Drahozal, C. “*Federal Arbitration Act Preemption*”, *IND. L. J.* 79, (2004), p. 393.

Model Law during this process³³. Arbitration laws of the states encourage implementing arbitration awards of FAA provisions in the current situation and reversing judgments is unique to limited situations³⁴.

Arbitrability has not been regulated in FAA clearly³⁵. Yet, in interpreting arbitrability, it is possible to mention the existence of a presumption in the law in favour of arbitration. Therefore, the law involves a policy in favour of arbitration. As a result of this, arbitrability is shaped by the opinion of the courts. In a case in which this issue came up³⁶ Supreme Court of U.S. stated that this kind of arbitrability issues must be tackled by considering the federal politics that approach arbitration to competition law positively.

Together with the increase in trading volume in the U.S., arbitrability of competition law disputes has been an attractive issue. During this process, the question of whether arbitration contracts deciding that disputes over competition law would be resolved via arbitration would be valid or not, has been a matter of controversy both in the U.S. and in other countries where verdicts by these contracts are put into effect.

In 1970, the Congress ratified the New York Convention which was ratified by 55 countries in 1958 by enforcing article 2 of FFA. The Convention which aims commercial arbitration treaties to be recognised and applied with a liberal approach has been supported by many sectors, primarily by the business sector.

A significant limitation has been brought for the recognition of arbitration award as per article V(2) and accordingly, in the case that the dispute subject to foreign arbitration award was considered ineligible to arbitration according to the law of the country where it would be enforced, this verdict would not be recognized in that country. Clause (b) of the same article mentions public order as a cause of limitation; thus, the questions of both what the content of dispute ineligible to arbitration is and what must be understood from public order came up. At this point, drawing the lines of arbitrability and public order in line with the verdicts is of importance in terms of whether other provisions of the New York Convention would be applied or not.

3.2 Arbitration in E.U. Law

The commencement of the trend in which private law sanctions gained importance in EU competition law traces back to the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty³⁷. The increase in private law sanctions regarding competition breaches in EU member countries courts has brought into the question of how and to what extent demands arising from private law could be brought to arbitration judgement.

The reason for competition law disputes to be taken to arbitration judgement is mostly the existence of a contract between the parties. Sometimes, disputes regarding competition law can be taken to court as the principal case, but most of the time in practice it occurs when the defendant asserts invalidity of the contract due to contradiction to competition law in the court as a plea (*Euro-defence*). On the other hand, in some situations parties may decide to

³³ Drahozal, C. "New Experiences of International Arbitration in the United States", *The American Journal of Comparative Law*, Vol:54, (2006), p. 236.

³⁴ As per FFA article 10 these situations are a) the verdict's being given by means of deceit or perverting the course of justice b) arbitrators acting dishonestly while making decision c) arbitrators not examining proofs or giving up acting unbiased against one of the parties d) arbitrators exceeding their authority or concluding before the dispute issue is completed.

³⁵ However, in Chapter 9 of the Code, arbitration is limited in terms of disputes of which party are shipmen, railway workers or workers employed in international trade.

³⁶ *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983).

³⁷ The Legislation to be mentioned in the study from now on will be referred as Regulation no. 1/2003.

take the dispute to arbitration by mutual agreement. Another frequent dispute that is taken to arbitration judgement is when action for compensation is taken to court following the determination of breach within the context of competition rules by the Commission or member countries competition authorities. In such a case the duty of the arbitration is to determine the extent of damages on the basis of quantitative proofs provided by the parties. Finally, as per article 9 of Regulation no 1/2003³⁸, claims regarding the correct implementation of access approval conditions and obligations might be taken to arbitration³⁹.

Today, in many European countries mainly in Austria, Belgium, Britain, France, Germany and Italy arbitration eligibility of demands arising from competition law is accepted and in practice these demands are determined via arbitration courts. Despite exceptions in practice, it is possible to speak of a consensus in Europe in the issue of arbitrability of competition law in general and article 102 and 102 of the Treaty in private. There are many verdicts in which ICC examined and resolved commercial contracts as per article 101(2) of the Treaty⁴⁰.

In conclusion, it is stated that arbitrability of disputes in terms of E.U. competition law has been resolved in a positive way for a long time with the effect of practices⁴¹. However, it can be said that arbitrability in competition, which is a problematic issue, will continue to be discussed and shaped by practices. In order to develop a better understanding of this process, it will be a good idea to refer to the verdicts of European Court of Justice and the Commission.

Non-arbitrability of the verdict by subject-matter by the arbitrators and public order have been regulated as two separate causes for denial, but it has been discussed that arbitrability is indeed equivalent to public order⁴².

³⁸ Article 9, Commitments:

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:(a) where there has been a material change in any of the facts on which the decision was based;(b) where the undertakings concerned act contrary to their commitments; or(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

³⁹ See *DaimlerChrysler*, COMP/E-2/39.140, 13.9.2007; *Toyota*, COMP/E-2/39.142, 13.9.2007; *Opel*, COMP/E-2/39.143, 13.9.2007; *German Electricity Wholesale Market*, COMP/B-1/39.388, COMP/B-1/39.389; *German Electricity Balancing Market*, OJ C 146, 12.6.2008, 34-35.

⁴⁰ See: the list of verdicts regarding competition law disputes by arbitration courts in IIC. Blanke, G. and Landolt, P., "*E.U. And U.S. Antitrust Arbitration*" Kluwer International Law, (2010), p.2201.

⁴¹ Blanke, G., Nazzini, R. "*Arbitration and ADR of Global Competition Disputes: Taking Stock (Part I)*", G.C.L.R. Issue 1, (2008), p. 54-55, Mourre, A. "*Arbitrability of Antitrust Law from the European and US Perspectives*", Kluwer Law International, (2010), p. 16.

⁴² For example in its verdict dated 1979 Belgium Supreme Court evaluated arbitration ineligibility in the same extent with public order see: Mourre, A. "*Arbitrability of Antitrust Law from the European and US Perspectives*", Kluwer Law International, (2010), p.17.

CHAPTER 4: Competition Disputes and Commercial Arbitration

International commercial arbitration has become the most popular problem solving element in the last decades especially between the international relations. Especially, competition law disputes are not recognized totally as a problem solving mechanism, because there were concerns of the countries to protect their mandatory provision of laws. On the other hand, arbitration law has shown a great development in time and it recognized now as an element to solve disputes by many courts and law systems. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴³ has an important role for this process.

4.1 The Basis For Arbitration Competition Disputes

There are legal grounds for arbitrating competition disputes such as international documents New York Convention and Geneva Convention⁴⁴. Today, most of the international commercial agreements use the arbitration as a dispute resolution method for the possible antitrust concerns that may be claimed by the parties. It is also stated that competition law disputes occur from an ordinary contractual dispute submitted to arbitration⁴⁵. But before the enactment of New York Convention, arbitration of competition disputes have seen as a dangerous element that arbitrators can harm the public law norms.

New York Convention set a different two notions as subject matter arbitrability and public policy to refuse recognition and enforcement of arbitral awards⁴⁶. Hence, member states can adjust their provisions that disputes can be submitted to arbitration and national courts can determine the public policy infringements.

In Europe, countries such as France and England's national laws on commercial arbitration are based on the UNCITRAL Model Law⁴⁷. This law does not cope with the subject matter arbitrability and countries can make a distinction with the specific type of disputes. On the other hand, legal provisions do not always give the answer of arbitrability and they give the responsibility to national courts to fill the gaps.

4.2 Stages of the Arbitrability Disputes

An issue may be existed by the claims of the parties or the court's decisions. Various considerations may be given depending on the different stages. According to Varady, there are mainly four stages when arbitrability disputes may occur:

Before a national court deliberating whether to enforce an arbitration agreement; before the arbitrators themselves as they try to decide the scope of their competence; before a court, generally in the country where the arbitration has taken place, in an action to set aside the award; and, finally, before a court asked to recognize and enforce the award⁴⁸.

All these four stages differ from each other in regarding to applicable law. So that, at different stages different norms should be used.

⁴³ (New York Convention), 10 June 1958, available at: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

⁴⁴ European (Geneva) Convention on International Commercial Arbitration, 21.04.1961, available at: <http://nasamer.ku.edu.tr/sites/nasamer.ku.edu.tr/files/mevzuat/conventions/geneva%20conv.pdf>

⁴⁵ G., Nazzini, R. "Arbitration and ADR of Global Competition Disputes: Taking Stock (Part I)", G.C.L.R. Issue 1, (2008), p. 47

⁴⁶ Article V(2)(a)-(b)

⁴⁷ Available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

⁴⁸ Tibor Varady and John J. Barcelo III, et al, "International Commercial Arbitration: A Transnational Perspective", 4th edition, West 2009, p. 234

According to the New York Convention, The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless if the court reaches the conclusion that arbitration agreement is null and void, inoperative or incapable of being performed⁴⁹.

⁴⁹ Article II(3)

CHAPTER 5: Arbitrability in Different Issues in Competition Law

5.1 U.S. : The Position of U.S. Courts

Prior to *Mitsubishi* verdict of Supreme Court dated 1985 in which case the United States Supreme Court decided to concern arbitration of antitrust claims, U.S. courts decided that demands of competition law were not eligible to arbitration steadily⁵⁰. The court in *American Safety* decision⁵¹ approached the issue rather restrictedly by saying “a claim under the antitrust laws is not merely a private matter”. In the justification of the verdict, this situation was explained as “Antitrust violations can affect hundreds of thousands –perhaps millions- of people and inflict staggering economic damage,... in fashioning a rule to govern the arbitrability of antitrust claims we must consider the rule's potential effect... We do not believe that Congress intended such claims to be resolved elsewhere than in the courts⁵²”. For this reason, it was stated in the law. Therefore, even it is not clearly given in the decision, that disputes resulting from competition laws can not be resolved via arbitration⁵³. Additional reasons advanced by courts in favor of nonarbitrability included that: “private suits aid enforcement; contracts generating antitrust disputes are often contracts of adhesion;” antitrust litigation required sophistication rather than the speed and simplicity of arbitrations; and antitrust was too important to be left to private parties⁵⁴. The main point emphasized the fact that a system which allocated resolving disputes to courts only would breach international trade and put a damper on businessmen’s desire to make commercial contracts. In this sense, the Court expressed that the Convention’s restrictive provision regarding arbitration had to be interpreted narrowly.

In *Scherk* case⁵⁵ (6 years after the *American Safety* verdict), it was discussed whether arbitration was a legislative supervision tool or not.⁵⁶ It was a 1971 dated case that there was a dispute between a domestic and a foreign company where arbitrability was at issue, the Supreme Court had ordered the parties to arbitration⁵⁷. In the verdict of Supreme Court it was stated that arbitration condition in the contract based on the international commercial relationship between the parties no matter what the dispute was had to be respected and recognized by the federal court as per directed the practice in terms of arbitrability of private legal demands resulting from breaches of competition law.

Mitsubishi case⁵⁸ has an important role for arbitrability between the natural persons that breaches the competition laws. In this case the practice in *Scherk* case was extended and carried into the field of competition law. Two problematic fields were discussed in the case;

⁵⁰ Although there is no provision stating that private law demands related to competition law are ineligible to arbitration in FAA, published in 1925, courts approached this issue negatively.

⁵¹ *American Safety* 391 F.2d 821, 826-27 (2nd Cir. 1968).

⁵² Id. at 826-27.

⁵³ Fraga, P. J., “Doctrinal Development In United States Arbitration: A Metamorphosis Of Paradigms Beyond Gregor Samsa’s *Imagination*,” U. Miami International & Comparative Law Review Vol. 15:2, (2007), p. 295.

⁵⁴ Areeda & Hovenkamp, supra note 1, at 215.

⁵⁵ *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974).

⁵⁶ Although the case was about the arbitrability of disputes regarding capital market, the practice appeared in this case became guiding in cases of competition law disputes later on. In a case in which a German citizen was sued for breaching Securities and Exchange Act dated 1934, *Scherk* took the issue to arbitration as to arbitration article of the contract and District Court denied *Scherk*’s demand. In the justification the Court stated that an arbitration agreement would not deprive a securities buyer of judicial ways as per the Act dated 1933.

⁵⁷ *Scherk v. Alberto-Culver, Inc.*, 417 U.S. 506(1974).

⁵⁸ *Mitsubishi Motors Co. v. Soler Chrysler-Plymouth*, 473 US 614 (1985). The dispute arose from the distribution and sales contracts between Japanese automobile manufacturer Mitsubishi and Soler Chrysler (Soler). According to the contract, Soler was to distribute the cars manufactured by Mitsubishi in a certain district and also according to a sales contract between the parties it was sell Mitsubishi products directly. The sales contract included the company called Chrysler which had a joint venture with Soler and there was the arbitration condition in this contract. Because Soler could not fulfil the condition of minimum sales, Mitsubishi took the dispute to arbitration and also sued Soler in USA District Court. Soler claimed illegality in the countersuit and asserted that Mitsubishi and Chrysler limited trade by sharing the market in a way that constitutes a crime within the context of Sherman Law.

one of which was how to approach material rules mandatory in the field of arbitration and whether adjudicators were authorised to decide on demands regarding mandatory rules and in the event that it were possible, what kind of balancing factor arbitration would be in public provisions. Another point discussed was how arbitrators had to behave in relation to mandatory material law rules.

The U.S. Supreme Court in the *Mitsubishi* case very obviously stated that if one of the parties argues a claim of breach of the Sherman Act, the court has to decide on that request, without considering the parties' express stipulation in favor of Swiss Law. The Court, however, failed to set up a clear criterion for the application of mandatory norms foreign to the *Lex contractus*. Rather, it stated:

*"The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American anti-trust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim"*⁵⁹.

Consequently, the party could have appealed for the validation of Japanese antitrust law and the arbitrator would have to apply it without the consideration of the applicable law and the fact that the contract is to be performed and almost certainly to be enforced in the U.S.

5.1.1 Reflections of *Mitsubishi* Case and "Second Look" Doctrine

Supreme Court revealed the ground of arbitration judgment in terms of competition rules in the justification of *Mitsubishi* verdict. However, the court also stated that U.S. competition law rules had to be taken into account. Otherwise, arbitration awards could be invalid because of contradiction to public order.

This statement was understood by some writers as a warning the court gave in terms of competition laws arbitrability within the scope of Federal Competition Law⁶⁰. According to these writers in the event that the court did not consider U.S. competition rules during arbitration process, arbitration award could be invalid as a result of contradiction to public order.

It is stated that following the *Mitsubishi* case public order concept started to be used as supervision tool in the arbitrability of disputes related to competition law⁶¹. According to another view, public order which aims to protect basic values of countries is a necessary and sufficient means to prevent breach of basic principles of competition law⁶².

On the purpose of providing equity, in the event of competition disputes, the national courts partially interfere to arbitrators during the process for those who can be negatively affected from the execution of competition law; besides, they reserved a right to judicial review of arbitral awards. So called, the second look doctrine was introduced by the U.S. Court in *Mitsubishi* case⁶³. The second look doctrine is put into words in the following dicta:

⁵⁹ *Mitsubishi*, *supra* note 83 at 636.

⁶⁰ Brubaker, J. R., Daly, M. P. "Twenty-Five Years of the "Prospective Waiver" Doctrine in International Dispute Resolution: *Mitsubishi's* Footnote Nineteen Comes to Life in the Eleventh Circuit", *University of Miami Law Review*, Vol:64, (2010), p. 1234.

⁶¹ The general statements of Gordon Blanke.

⁶² Brozolo, R., "Arbitration in EC Merger Control: Old Wine In A New Bottle", *EBLR* (Special Edition), (2008), p.28.

⁶³ *Mitsubishi* case, *supra* note 13.

"having pennitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust law has been addressed"⁶⁴.

"Second look" doctrine has been considered as a guarantee for the ultimate review of compliance of arbitration awards with laws and legal practices. The court stated that in the case that an arbitration verdict was demanded to be applied in U.S. as per the provisions of the New York Convention, the review of arbitration verdicts by local courts in the US would prevail. However, the court stated that the review of arbitration verdicts regarding antitrust demands within the scope of Sherman Law would be rather limited and that the purpose of the review was to secure that antitrust demands were listened to and resolved during the arbitration judgment process.

On the one hand, court has revealed the legitimacy of arbitration judgement and it has hinted at the necessity that the verdicts must be made by means of court's approval. For this reason, it can be inferred that Supreme Court expects parties to obey competition laws in the U.S. even though they have the freedom to choose the law to apply. In his opinion about the implementation of "second look" doctrine in terms of U.S. law, Blessing⁶⁵ pointed out that arbitration board was not only a right in terms of compliance with U.S. antitrust laws but also had firm commitment. However, at this point, to what extent interference with verdicts must be is unclear. When the implementation limitations of *Second look* theory are considered, answers to some questions in *Mitsubishi* verdict are still uncertain.

The focal point of discussions following *Mitsubishi* case tried to answer the question of to what extent legal review of arbitration awards had to be. In a current verdict⁶⁶ Supreme Court stated that arbitration verdicts complied with the national policy in the direction that this judgement would be reviewed limitedly and thus causes for discontinuation had to be interpreted limitedly.

It is stated that the main purpose of this verdict is not to open the door for over-judicial review of arbitration judgement⁶⁷. According to Galbraith what matters is to improve arbitration process and distinguish the review of arbitration verdicts from classic court judgment rather than extending the causes of cancellation of arbitration verdicts⁶⁸.

Currently, discussions regarding arbitrability and review of arbitration verdicts have focused mainly on arbitrability of class actions and some issues that may arise as a result of some structural features of these cases. Different verdicts have been made regarding the legitimacy of arbitration agreements that prevent potential prosecutors from suing representative or class actions among federal courts. Four appellate divisions allowed for recognition and approval of this kind of arbitration disputes. Two appellate divisions decided in their *Ting v AT&T*⁶⁹ and *Kristian v. Comcast Corp.*⁷⁰ cases that arbitration clauses could not be contracted for these kinds of cases. On the other hand, the rapid increase in actions for compensation directed the focal point of discussion to class actions in arbitration cases. Nevertheless, in its *Stolt-Nielsen*⁷¹ verdict dated 2010; the Supreme Court pointed out that arbitration in class actions would not be possible so long as it was not stated in the contract between the parties explicitly.

⁶⁴ *Mitsubishi*, *supra* note 83 al 638.

⁶⁵ Blessing, M., "Arbitrating Antitrust and Merger Control Issues", *Helbing & Lichtenhahn, Swiss Commercial Law Series*, (2003), p.172.

⁶⁶ *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

⁶⁷ Reuben, R. C. "Personal Autonomy and Vacatur After Hall Street", *Penn State Law Review*, (2008-2009), p. 1105.

⁶⁸ Galbraith, A. B., "Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard", *Indiana Law Review* 27 241 ,(1993-1994), p. 25.

⁶⁹ *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

⁷⁰ *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003).

⁷¹ *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 176 L.Ed. 2d 605 (2010).

Consequently, when the development of arbitration in disputes regarding competition laws in the U.S. is examined, it is seen that the last thirty years have seen an acceleration regarding this issue. Although, arbitration practices have developed, a consistent practice regarding the review of verdicts cannot be spoken of. Previously, in the process which started with approving that inter-enterprise competition disputes were applicable to arbitration, there were scope discussions in the review of verdicts together with “*second look*” doctrine. The generally acclaimed approach was that second look doctrine functioned as a guarantee of courts in the review of verdicts, yet this review could not be a substantive review.

5.2 E.U.: Regulatory and Supervisory Function of the Commission in Arbitration Commitment

In many conditional allowance decisions arbitration procedure is foreseen, it is seen that the Commission has active or passive powers in many phases from choosing the people to carry out arbitration to conducting arbitration. Indeed, this situation results from Commission functioning as a supranational institution. The powers and duties of the Commission during arbitration judgement are as follows:

- Administrative function in cases where parties of the process cannot assign an arbitrator in due date or leaves assigning an arbitrator to the Commission in verdicts that arbitration procedure is foreseen.
- Functioning as supervisory of E.U. competition law rules to able to notify the parties if necessary in any phase from the commencement to the termination of arbitration process.
- Supervisory function for reporting what kind of precautions are taken by the parties to obey the final decision while commitments remain in the force in the phase following the termination of arbitration process and notifying the Commission.

The other Commission decision⁷², the interference of the Commission with the arbitration process via the above said functions are explained that in the event that arbitration parties conflict regarding the interpretation of the commitments in this verdict, the arbitrators will inform the Commission and receive the opinion of the Commission before finalising the arbitration process. The Commission may also notify the arbitrators in any phase of the arbitration process⁷³.

On the other hand, it has been stated that the arbitration process will not prevent the Commission from making new decisions regarding the commitments in line with the rights granted by EU Agreement and Mergers Regulation⁷⁴.

Finally, an intervention by the Commission would only be necessary in cases where the parties do not comply with the solutions found by those dispute resolution mechanisms. Therefore, what is privileged in cases in which monitoring of implementation of commitment conditions is left to the arbitrator by the Commission is resolution via arbitration and the intervention of the Commission is limited to problems that are encountered in dispute resolution.

⁷² Lufthansa/Austrian Airlines, 28.8.2009, Comp/M.5440

⁷³ Para 9.12.

⁷⁴ Para 9.13.

5.2.1 Arbitrability of Merger Control Disputes

In the context article of Council Regulation no. 139/2004⁷⁵ regarding the supervision of inter-enterprise concentrations, mergers which prevent competition in the common market in general or in part⁷⁶ are accepted to be unyielding and must be prohibited. However, competitive concerns regarding mergers could be eliminated by means of merger remedies. Today, merger remedies are an important tool in terms of the supervision of concentrations that could restrict competition in implementation of EU competition law⁷⁷.

Foreseen remedies in order to eliminate anticompetitive impacts that may arise as a result of mergers within the scope of Council Regulation no. 139/2004⁷⁸ may front us in many types but basically there are two:

- Parties separating part of the line of business where parties of the merger procedure operate in favour of other competitors (structural remedies).
- Parties of the merger arranging their behaviours in favour of the potential 3rd party competitors that may operate in the market in the future (behavioural remedies).

In the time course since 1989 when the first draft of the Regulation entered into force, in its many verdicts in which conditional mergers were allowed, the Commission accepted that whether behavioural remedies have been implemented correctly or not must be supervised and that arbitration process must be used for the whole implementation process. Behavioural remedies are generally ensured with the following methods:

- a. Undertaking access to technological or physical infrastructure in circumstances in which the process party becomes dominant or monopoly.
- b. Making goods supply or demand contracts within the extent of current or future business relationships between the procedure party and 3rd person competitors.
- c. Ensuring long-term contractual relationships in favour of 3rd person parties by the merging party or customers.
- d. Ensuring the termination of distribution contracts which bear anticompetitive impacts for 3rd person competitors by merging party or customers.

Behavioural remedies necessitate that the implication of the aforesaid or similar commitments must be supervised correctly and honestly in the medium term or long term to establish competition in the market. Although it can be said that this supervision has certain costs, in vertical or contrary mergers the advantages arising from behavioural remedies being flexible and changeable must be taken into consideration. Especially, when there is an institution that supervises the related market and when competitors and customers in the market are enthusiastic about supervision of the remedy, more effective supervision of a behavioural remedy is possible.

⁷⁵ (European Community Merger Regulation) Council Regulation no. 139/2004 which regulates inter-enterprise concentrations.

⁷⁶ Merger is used as a mutual concept for merger, takeover and joint venture in this chapter.

⁷⁷ Today almost 90% of merger procedures which could have anticompetitive effects are resolved by using merger solutions instead of prohibiting the procedure. See: Lindsay, A., *"The EC Merger Regulation: Substantive Issues"*, Sweet & Maxwell, London,(2006), p.547.

⁷⁸ In this chapter the concepts solution and commitment are used interchangeably for the concept "remedy".

During the initial phases of Council Regulation implementation, extensive monitoring of anticompetitive effects that may arise following the merger procedures has not been made. Especially because behavioural commitments require middle or long term monitoring in the related market, the Commission has not found this kind of commitments favourable⁷⁹. However, this situation changed with the 1992 Gencor⁸⁰ verdict of the Commission. In the verdict E.U. Court of First Instance emphasized that the distinction of behavioural and structural commitment in the merger commitments was not rather important and that although structural commitments to prevent the situation from strengthening were preferable in the current situation, behavioural commitments could also serve this aim⁸¹.

In this way, the court accepted that competitive concerns could be eliminated by not only structural commitments but also behavioural commitments or a by combination of both commitments.

Another related verdict is ARD verdict⁸². In the discussion that the behaviour which is the basis of the commitment must be monitored continuously, the court stated that arbitration was a sufficient method for monitoring. According to the court, 3rd parties who were not satisfied with the results of commitment could apply to arbitration judgement with the procedure party having the burden of proof. Similarly, in the Easy jet⁸³ verdict, it was stated that competitive concerns in the related market could be eliminated not only by structural commitments but also behavioural commitments or by a combination of these two types and that in this case an analysis had to be made on a case-by-case basis⁸⁴.

The principles that the Commission would consider commitments regarding concentration procedures were explained in the Commission Notice⁸⁵ no. 2008/C 267/01 regarding remedies acceptable (Notice) in a detailed way. In the notice text, arbitration judgment method was included directly and thus arbitration became a policy tool⁸⁶ of the Commission in terms of ex-ante supervision of concentrations. The related section of access commitments which refers to arbitration is as follows:

“Access commitments are often complex in nature and necessarily include general terms for determining the terms and conditions under which access is granted. In order to render them effective, those commitments have to contain the procedural requirements necessary for monitoring them, such as the requirement of separate accounts for the infrastructure in order to allow a review of the costs involved , and suitable monitoring devices. Normally, such monitoring has to be done by the market participants themselves, e.g. by those undertakings wishing to benefit from the commitments. Measures allowing third parties themselves to enforce the commitments are in particular access to a fast dispute resolution mechanism via

⁷⁹ Blanke, G. “The Use and Utility of International Arbitration in EC Commission Merger Remedies”, Europa Law Publishing, Groningen, (2006), p.15.

⁸⁰ Gencor v Commission, Case T-102/96, [1999] CFI. By decision of 24 April 1996, the Commission declared that the concentration was incompatible with the common market on the ground that it would have led to a collective dominant position on the part of the entity arising from the concentration and Amplats in the world platinum and rhodium market.

⁸¹ Para. 319: “What is preferred in commitments regarding merger procedures that may bear the result of creating or empowering the dominant situation are structural commitments which enable middle or long term monitoring. Also, commitments that may be described as *prima facie* behavioural could be appropriate in this kind of merger procedures.”

⁸² ARD v Commission, Case T-158/00, 30.9.2003. ARD was in Pay-TV markets and digital interactive television services. It was serious doubts as to compatibility with the common market.

⁸³ Easyjet Airline Co Ltd v Commission of the European Communities (T-177/04) [2006] E.C.R. Under Regulation (EEC) No 4064/89 - Decision declaring a concentration compatible with the common market - Action brought by a third party - Air transport market.

⁸⁴ Blanke G. and Sabahi B. , “The New World of Unilateral Offers to Arbitrate: Investment Arbitration and EC Merger Control”, (2008), p.217.

⁸⁵ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF> (access date: 27.04.2014)

⁸⁶ According to Brozolo arbitration mechanism in merger verdicts is not different that classic commercial arbitration in which disputes regarding competition law are resolved. Therefore, arbitration here is not a new device in terms of supervisory duty of the Commission (Brozolo, R. , “Arbitration in EC Merger Control: Old Wine In A New Bottle”, EBLR (Special Edition), (2008), p.8).

arbitration proceedings (together with trustees) or via arbitration proceedings involving national regulatory authorities if existing for the markets concerned. If the Commission can conclude that the mechanisms foreseen in the commitments will allow the market participants themselves to effectively enforce them in a timely manner, no permanent monitoring of the commitments by the Commission is required. In those cases, an intervention by the Commission would only be necessary in cases where the parties do not comply with the solutions found by those dispute resolution mechanisms. However, the Commission will only be able to accept such commitments where the complexity does not lead to a risk of their effectiveness from the outset and where the monitoring devices proposed ensure that those commitments will be effectively implemented and the enforcement mechanism will lead to timely results”⁸⁷.

On the other hand, the diversity of non-divestiture commitments was pointed out and it was emphasized that a uniform requirements list cannot be suggested for this type of commitments. In the continuation of the notice the role of arbitration in this type of commitments is explained.

“However, given the long duration of non-divestiture commitments and their frequent complexity, they often require a very high monitoring effort and specific monitoring tools in order to allow the Commission to conclude that they will effectively be implemented. Therefore, the Commission will often require the involvement of a trustee to oversee the implementation of such commitments and the establishment of a fast-track arbitration procedure in order to provide for a dispute resolution mechanism”⁸⁸.

Actually, merger procedure reviews of the Commission are in a two-phase structure. As per article 6 of Concentration Regulation, if a merger procedure could bear competitive concerns in case it is allowed to, this verdict could be assigned with conditions and commitments in order for the parties to follow the commitments, that is to say the first phase (*phase I*). If competitive concerns regarding the result of this procedure pose an important hazard, the Commission may proceed to the second phase (*phase II*). The table below shows the statistical information regarding the verdicts which involve arbitration commitment to monitor the implementation conditional merge allowance decisions.

⁸⁷ Para 66.

⁸⁸ Para 130.

Table: Arbitration in the Commission's Merger Allowance by Numbers

Verdicts which the Commission involved Arbitration Commitment between the years 1992 and 2009						
	Phase-1 verdicts		Phase-2 verdicts		Total	
	Involving Arbitration	Total	Involving Arbitration	Total	Involving Arbitration	Total
Involving Arbitration commitment	37	100	20	100	57	100
Behavioural	19	51	6	30	25	44
Structural	3	8	0	0	3	5
Behavioural and Structural (Combined)	15	41	14	70	29	51

*Source⁸⁹

When the statistics are examined, it can be seen that the Court included arbitration resolution regarding the correct implementation of resolutions in 57 out of 277 conditional allowance verdicts, in phase I or phase II, between the years 1992 and 2009. In other words, arbitration clause was included in almost 21% of the conditional allowance verdicts following the period when Concentration Regulation entered into force. From this point of view, it can be said that the number of verdicts which include arbitration article increased in parallel to allowing conditional mergers. Especially the increase in behavioural merger resolutions foreseeing arbitration shows that the use of arbitration as a tool of monitoring mechanism in the Commission's conditional merger verdicts has come to the fore.

5.2.2 Commission's Practice of Arbitration in Conditional E.U. Mergers

The first guiding decision that the Commission directly included arbitration is *Alcatel/Thomson*⁹⁰ (CSF-SCS) verdict. The verdict was about a joint venture named Société Commune de Satellites ("SCS") which was founded to operate in fields such as defence and aviation between Alcatel and CSF Thomson (now known as Thales)⁹¹.

In the arbitration commitment section of the verdict, it was stated that any of the ventures which suffered from the commercial relationship with TTE and was a competitor of SCS joint venture could take its demand to arbitration judgment the way that the dispute could be resolved in limine. According to the verdict, powers of the arbitrator were sufficient to resolve the disputes. Together with the commitment in this text, the parties leave the

⁸⁹ Blanke, G. & Landolt, P. "EU and US Antitrust Arbitration", Kluwer Law International, The Netherlands, Blanke G., "Arbitration and ADR in EU Merger Control", (2011), p. 1646.

⁹⁰ Alcatel/Thomson (CSF-SCS), 4.6.1998, IV/M.1185.

⁹¹ Because of the disputes arising from satellite manufacturing in operations of the joint venture of SCS and TWT via which Thales' company TTE (now TED) operates, The Commission identified a market foreclosure risk in terms of main satellite contractors and phase II was started due to the risk of serious anticompetitive effect.

resolution of the dispute to the arbitrator finally and thus this commitment will overreach being merely a behavioural commitment.

In *Telia/Sonera*⁹² verdict, it is seen that the Commission encouraged a conditional merger allowance decision that included the commitment of not making discrimination via arbitration judgment. In this case, a merger process between Telia, which is a Swiss telecommunication and cable TV operator and Scandinavia's greatest service provider, and Sonera, which is one of the greatest cable TV and long distance telephone operators was commenced. The Commission, by considering the dominant position of Sonera, foresaw that in the event that Telia pulled out of the Finnish market, an anticompetitive structure would appear in the wireless communication market. The Commission also stated that the power of both ventures in the wholesale market could create a market foreclosure effect against retailers and cause monopolistic behaviour. Therefore, in the verdict the Commission asked for the merging ventures to bring some commitments to provide a prudential competitive environment in the market. Accordingly (a) Telia and Sonera would separate their mobile and immobile infrastructure in Switzerland and Finland and provide non-discriminating infrastructure service to 3rd parties, (b) Telia would separate their mobile infrastructure in Finland and potential buyers would be ensured to benefit from commercial conditions of Sonera's mobile infrastructure.

In the decision text, the Commission stated that the regulation regarding non-discriminating behaviours supported by arbitration judgment would secure transparency and thus 3rd parties could determine such behaviours more easily and respond accordingly. This way, when arbitration proceeding is considered together with behavioural commitments, competitive concerns that foreclosure effects regarding upstream market may arise will be eliminated to a great extent.

In the Commission's *Reuters/Telerate*⁹³ verdict, the advantage of arbitration mechanism in the resolution of license agreement disputes was pointed out. The issue was concluding the merger procedure between Reuters, the world's biggest multimedia information provider which provides special information for finance services, media and public sectors and, and Telerate, which operates as information provider in the field of finance. As a result of the procedure, Reuters was supposed gain control over Telerate. The Commission stated that in the market data platform market Telerate was a factor that provided competition against Reuters and that competition would decrease after the merger. The parties suggested a license agreement with special conditions to the Commission. The commission decided that a licence resolution would be more efficient rather than decomposition due to the position of Telerate in the financial market.

In conclusion, it was stated that arbitration mechanism within the context of commitment would provide "full protection"⁹⁴ in disputes arising from license agreements and that licence agreement could be abrogated by arbitrator court award.⁹⁵ For this reason, licence agreement is a part of commitment verdict⁹⁶.

Another verdict of the Commission dated 2009 was related to the takeover of T-Mobile, an Austrian telecommunication company, and mobile telephone operator Telering⁹⁷. The interesting thing about the verdict was who would carry out arbitration judgment regarding the implementation of commitments of the parties for the acceptance of

⁹² *Telia/Sonera*, 10.7.2002, Comp/M.2803.

⁹³ *Reuters/Telerate*, 23.5.2005, Comp/M.3692.

⁹⁴ Para. 33

⁹⁵ Para. 27.

⁹⁶ Blanke, G. "The Use Of Arbitration in EC Merger Control: Latest Developments", *E.C.L.R.* 2007 Issue 12, (2007), p. 678.

⁹⁷ *Austria/Telering*, 26.4.2006, Comp/M.3916

the procedure in this conditional takeover. In this case, the subject—matter was the takeover of Telering firm, which provided service to the final consumers in Austria telecommunication market at an affordable cost, by T-Mobile, one of the telecom companies in the market. The Commission concluded that even if T-Mobile was not going to be dominant after the procedure, competitive Telering's pulling out of the market would prevent competition in terms of final consumers in Austria mobile telephone market. Following this decision, the parties made a commitment that UMTS frequencies owned by Telering would be separated into H3G and another small company in the market. Although, the aforesaid commitment may be described as structural and monitoring mechanism is not quite effective in this kind of commitments, arbitration mechanism has been included here for being long-term. According to the verdict, in case of a dispute between the parties in terms of fulfilling the commitments, Austrian Regulatory for Telecommunications would serve⁹⁸ as arbitrator⁹⁹.

In Axalto/Gemplus100 verdict of the Commission, a two-phase system was brought in terms of monitoring commitments and dispute resolutions. The procedure was the takeover of Gemplus International SA via purchasing shares by Axalto Holding NV, which operated in magnetic smart card market. According to the verdict, Axalto was to assign a trustee who would consider 3rd parties views on commitments. The duty of this person was to ensure that commitment would be implemented easily as a phase before arbitration. In the event that disputes were not resolved by this person, then 3rd party benefiter could demand a fast arbitration process.¹⁰¹

Another way arbitration mechanism is used by the Commission is granting the arbitrators to make “preliminary decision” in a merger procedure which includes arbitration phase and is in the phase of inquiry. Current examples of this method are seen in the verdicts about consolidations in airlines. Within the last three and four years the Commission granted conditional allowance to some mergers¹⁰² and prohibited some mergers in this sector.

For example, the Commission foresaw a two-phase resolution regarding resolution disputes arising from commitments in the verdict about the takeover of Austria airline by Lufthansa¹⁰³, the greatest airline of Germany, alone. According to the verdict, the trustee would monitor the commitments, but in case a potential firm new in aviation sector, or a new airline service provider thought that these commitments were not implemented correctly, then they would apply to arbitration mechanism. The arbitrators assigned by the parties could make preliminary decisions on disagreed points till a third party assigned the arbitrator. Moreover, in case of the existence of contractual conditions that caused dispute in the preliminary or final decision, they could make decisions to provide compliance with commitments. During this process arbitrators could demand any kind of information from the parties. Also, burden of proof belonged to the party that demanded arbitration. The verdict of the arbitrators would bind the parties, yet when the problem of interpretation regarding the implementation of commitments arose, the Commission could be asked for opinion.

⁹⁸ Also the Commission asked for opinion to Austrian Regulatory Authority for Telecommunications regarding commitments following the market analysis of commitments. In their view Austrian Regulatory Authority for Telecommunications stated that commitments were sufficient to strengthen the role of small competitors and were mandatory conditions to keep the level of competition same as it was used to be.

⁹⁹ Here a regulatory authority is assigned as arbitrator and thus when a problem regarding the implementation of commitments occurs in the market which is already supervised by the authority, the regulatory authority notifies the parties and competition authority steps in in the next phase. Besides, in markets where there is this kind of supervisory institution already behavioural commitments and arbitration mechanism is more efficient and thus more preferable.

¹⁰⁰ Axalto/Gemplus, 19.5.2006, Comp/M.3998.

¹⁰¹ For similar files see Schneider Electric/APC, 8.2.2007, Comp/M.4475; SFR/ Tele 2 France, 18.7.2007, Comp/M.4504.

¹⁰² See Lufthansa/Eurowings, 22.12.2005, Comp/M.3940; Lufthansa/Swiss, 4.7.2005, Comp/M.3770; Lufthansa/SNAH, 22.6.2009, Comp/M.5335; Iberia/Vueling/Clickair 9.1.2009, Comp/M.5364.

¹⁰³ Lufthansa/Austrian Airlines, 28.8.2009, Comp/M.5440

When the common traits of the aforesaid verdicts are examined, it is possible to conclude that:

- In comprehensive takeovers that bear competitive concerns, the parties' commitments to apply for arbitration are on their own free will and this commitment is presented to the Commission in written.
- Arbitration commitments in the verdicts do not eliminate the authority of the Commission in monitoring and ensuring the correct implementation of resolutions and are accepted as secondary obligation.
- There is an attempt of resolving the disputes ex-ante in resolutions that include arbitration.
- In the merger procedures, in disputes that may arise from issues such as contractual disputes during the implementation of commitments arbitration board has a judicial function.

5.2.3 Divestiture /Decomposition Expert and Arbitrage

In many recent conditional allowance verdicts of the Commission, it was foreseen to assign a trustee who would function as a supervisor or discriminator. For example according to Axalto and T-Mobile verdicts, the duty of these people would be to ensure the implementation of arbitration with ease as the phase before arbitration. In the event that disputes were not resolved by these people, then 3rd person beneficiaries could demand a fast-track arbitration process. Divestiture experts /supervisor experts who are assumed to have a secondary function have undertaken a more active duty in some comprehensive merger verdicts recently.

In *Gaz de France/Suez*¹⁰⁴ verdict which is one of the verdicts that includes commitment in energy sector the power of the arbitrator and emissaries were regulated. According to the decision, any dispute that could arise from commitments regarding gas reserves would be resolved by an assigned person who worked in a regulatory institution of gas transmission and trade in Belgium. The decisions of this person would be binding for the parties of the dispute. However, in the event that the parties were not satisfied with the decision, they would apply to arbitration. Accordingly arbitration decision would be preferred over the assigned person's decision and be binding.

6.3 The Status of 3rd Person Benefitters in Arbitration Commitment and its Interaction with the Powers of the Arbitrator

Basically arbitration commitment is bringing commitments on the merging party that that could entitle rights for merging enterprise or 3rd party within the extent of resolution package within the scope of condition merger allowance of the Commission¹⁰⁵.

Typically, in commencement of an arbitration process, the 3rd person who has benefits regarding the process and who wants to state a demand to the merging party will base on the arbitration article in the commitment letter attached to the Commission's verdict or in the main text of the Commission verdict. If 3rd person benefiter contracts an implementation agreement to ensure the implementation of behavioural commitment regarding the merging party, she/he can base on the commitment article in this agreement. In some conditional

¹⁰⁴ *Gaz de France/Suez*, 14.11.2006, Comp/M.4180.

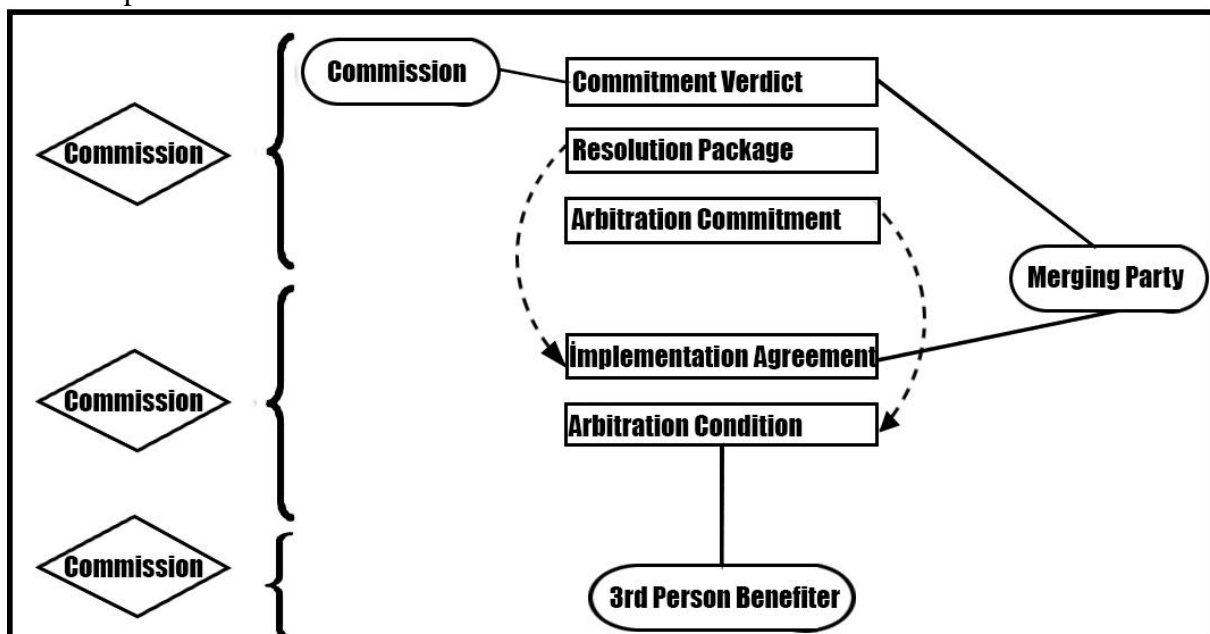
¹⁰⁵ Blanke, G. "The Use Of Arbitration in EC Merger Control: Latest Developments", *E.C.L.R.* 2007 Issue 12, (2007), p. 675.

allowance verdicts of the Commission¹⁰⁶ it is seen that commitment agreements are included attached together with the arbitration clause. Again, in some verdicts, the commitment of notifying potential 3rd person beneficiaries who would benefit from the merger procedure may apply to arbitration¹⁰⁷ is included.

As a matter of fact, in the arbitration method regarding the commitments in the merger verdicts arbitrators may make decisions on mainly two issues:

- Resolving disputes arising from implementation agreements in the characteristics of subsidiary commitments which have been prepared regarding the implementation of the commitments included in the attachment of merger verdict in line with classic commercial arbitration principles.
- Resolving the disputes arising from the commitments of the merging party in regard to the points in the commitment section of the merger verdict in line with the basis and method in the arbitration commitment.

In this context for the disputes related to merger verdicts, the process shown in the below scheme operates.



Scheme: The Role of Arbitrator in Arbitration Judgment and Interaction with the Parties

Source: *¹⁰⁸

Accordingly, the implementation of arbitration by arbitrators is composed of a number of interrelated phases. First of all, the arbitrator will resolve any kind of fact and procedural dispute arising from implementation agreement (e.g. subsidiary agreements, licence agreements) in order to ensure the compliance with behavioural commitments and then will consider the compliance of this agreement with commitments/verdict. The commitment verdict will be binding in terms of the Commission and the parties of the merger and the

¹⁰⁶ For example, in Reuters (Comp/M.3692) verdict, the licence agreement contracted between US Hyperfeed Technologies and enterprise regarding Telerate's MDP product is in the appendix of the Commission verdict. (Reuters/Telerate Case No COMP/M.3692). For similar verdicts, see: *Tetra Laval/Sidel*, 13.1.2003, Comp/M.2416; *Shell/DEA*, 20.12.2001, Comp/M.2389; *Iberia/Vueling/Clickair*, Comp/M.5364; *Lufthansa/SNAH*, Comp/M.5335.

¹⁰⁷ See. *Piagio/Aprilia*, 11.1.2005, Comp/M.3570; *Alcatel/Thomson*, IV/M.1185; *Carrefour/Promodes*, 25.1.2000, Comp/M.1684; *Marta/Aerospatiale*, 28.4.1999, IV/M.1309.

¹⁰⁸ Blanke, G. & Landolt, P. "EU and US Antitrust Arbitration", *Kluwer Law International*, 2011, The Netherlands, Blanke G., *Arbitration and ADR in EU Merger Control*, (2011), p. 1646.

implementation agreement regarding the private law of the process will bind both the parties of the merger and 3rd person beneficiaries (e.g. 3rd persons to benefit from licence agreement). As a result of this, 3rd person beneficiaries¹⁰⁹ will be bound by the arbitration commitment to the extent that the arbitration article in implementation agreement is close to the main verdict or attached arbitration commitment in terms of content¹¹⁰

Besides, it is possible to list the main powers of the arbitrators in this process as follows:

- The power of demanding any kind of information necessary for the resolution of disputes.
- The commitment of secrecy.
- The power of making inquiry-like examination in case assigned to resolve the dispute
- Especially in implementation agreements connected to the verdict which is the subject matter of arbitration, the commitment of taking temporary protection precautions when necessary to protect the right which is the subject matter of arbitration.
- The commitment of taking the proofs provided by the parties into consideration and termination of dispute resolution speedily.

Finally, an arbitrator(s) is obliged to accept previous implementations of E.U. competition law rules and market conditions to which the dispute is related as reference point.

5.2.5 Arbitrability of Article 101, 102

One important verdict which dealt with public order and arbitrability of competition law is *Eco Swiss China Ltd v Benetton International NV (Eco Swiss)*¹¹¹ case which was heard in Danish Court initially and then taken to European Court of Justice. Benetton was sentenced to compensation by the arbitration board on grounds of avoiding the contract between itself and Bulovain unjustly. Upon this verdict, Benetton stated that the licence contract was contrary to article (a) 81 (now article 101) due to the provisions regarding market share and that (b) article 81 was related to public order as per Danish Legal Proceedings Law. The appeal court stated in their verdict that article 81 was part of public order as per Danish Adjective Law since articles 81 and 82 were the guarantee of the future common market and that the sanctions in the article were the milestone of this guarantee. Besides, it stated that

¹⁰⁹ 3rd parties via arbitration article in conditional merger allowance verdicts may demand rights from parties who made some commitments by basing on these commitments within the extent of the verdict in which merger-takeover has been notified and the process has been allowed conditionally. Accordingly, main rights that parties may demand are as follows: The compensation of the damages caused by the parties implementing the commitments incorrectly or not implementing at all, and/or if there is a complex agreement based on a private resolution in the verdict fulfilling the commitments basing on this contract.

¹¹⁰ Blanke, G. & Landolt, P., "EU and US Antitrust Arbitration", *Kluwer Law International*, 2011, The Netherlands, Blanke G., Arbitration and ADR in EU Merger Control, (2011), p. 1647.

¹¹¹ *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055. The importance of this case stems from the fact that the relationship between Union competition law and arbitration judgment was first asked to and demanded for opinion to European Court of Justice. In the case, Benetton International NV (Benetton), centred in Denmark, Eco Swiss China Time Ltd (Hong Kong) and Bulova Corporation (Bulova), centred in the U.S., contracted an 8-year licence contract. According to the contract the watches to be manufactured would be called Benetton and Bulova. Eco Swiss was supposed to manufacture and distribute. The contract included an arbitration article that disputes arising from this contract would be arbitrated by Netherland Arbitration Court (NIA). Later, Benetton notified Bulova and Eco Swiss to dissolve the contract for copyright issues but the parties denied this notification and applied to arbitration judgment. As a result of the judgment, the Court found Benetton's dissolve notification to be unjust and sentenced Benetton to pay 30 million dollars compensation for dissolving the contract unjustly.

because the mentioned provisions of the Agreement were part of public order, the general court or arbitration board was obliged to implement these rules ex officio even it had to exceed parties will. Consequently, appeal court acknowledged Benetton to be right in the verdict.

In its analysis, Supreme Court stated that in order for an arbitration award to be contrary to public order in terms of domestic law, arbitration award had to breach mandatory articles and that an arbitration award which breached the articles of competition law in terms of Danish domestic law could not be seen as contrary to public order¹¹². However, the question of how the issue must be interpreted when community competition law is regarded is left unanswered.

In order to eliminate uncertainties related to the issue, 5 questions (3 questions regarding the essence of the issue and 2 questions regarding the procedure) were asked to ECJ by Supreme Court.

- Should arbitration board implement this article ex officio in a situation in which arbitration parties did not demand the implementation of article 81?
- If a court in Denmark thinks that an arbitration award is contrary to article 81, can it reverse this verdict on the grounds that it is contrary to public order?
- Should the court in Denmark reverse arbitration award if it thinks that the issue of applicability of article 81 is out of the scope of dispute and the verdict is contrary to public order in a situation in which arbitrators do not make a verdict regarding this issue?

European Court of Justice gave a positive answer to question 2, the most comprehensive question¹¹³. Therefore, according to the Court of Justice, contradiction to article 81 may be a cause of reversal in terms of public order if it is seen to be a cause of reversal in the related country's domestic law.

An *Eco Swiss* case-connected verdict of Court of Justice is the *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (Manfredi)*¹¹⁴ verdict dated July, 2006. Similar to the interpretation in *Eco Swiss* case, the verdict stated articles 81 and 82 to be a matter of public order that had to be implemented ipso facto by national courts. According to this decision, while reviewing arbitration award, judges must consider the verdict's compatibility with Union's competition law rules as a matter of public order.

At this point, a dispute can be pointed out between party autonomy principle, which is a widely accepted rule, and arbitrators' duty of implementing competition law regulations ex-officio. The aforesaid dispute brings up two questions: Can the judges be enjoined to implement Union's competition law rules without being authorised to over party autonomy which arbitration judgment parties have in terms of the law to be applied? Also, an important matter, which Supreme Court did not ask to Court of Justice in *Eco Swiss* case, is what the extent of review that local courts have on arbitration verdicts must be. These questions have been discussed within the frame of "second look" doctrine¹¹⁵.

¹¹² See: Blanke, G. "The "Minimalist" And "Maximalist" Approach To Reviewing Competition Law Awards: A Never-Ending Saga", Stockholm International Arbitration Review, Issue 2, (2007),p. 65-66. Footnote 58 for comparative views on public order approach and its relationship with the principle of supremacy of EU competition law in *Eco Swiss* case.

¹¹³ The Court did not consider answering questions 1 and 3 which are related to question 2 after this interpretation as necessary.

¹¹⁴ *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA et al.* (2006) ECR I-6619 Joined Cases C-295/04 and C-298/04.

¹¹⁵ In "second look" doctrine the extent and intensity of review of arbitration awards by courts are discussed. (Nazzini, R. and Blanke, G. "Arbitration and ADR of Global Competition Disputes: Taking Stock (Part III)", *G.C.L.R.*, (2008), p.143). The purpose of "Second look" doctrine is to determine whether the court is obliged to implement articles 81 and 81 (now 101 and 102) and whether it is responsible for checking the compliance of award with competition law and to determine the extent of this obligation if there is such an obligation in situations in which the court is applied to to reverse or recognise arbitration award.

Another important and related case is *Thales v Euromissiles (Thales)*¹¹⁶ case. Thales which was found to be unjust in ICC arbitration asserted that arbitrators did not regard article 81 during the judgement and that the contract with the other party was invalid. In addition to these, Thales appealed to Paris Court of Appeal on the grounds that the verdict was contrary to “*international public order*”. In its primary verdict, the court ascertained that both parties did not assert the invalidity of the contract until Thales appealed the case and interrogated Thales’ autonomy in the appellate procedure. In the other part of the verdict, the court emphasized the legal security principle and pointed out that in order to assume that international public order was breached, this breach had to be apparent, effective and concrete; thus, it could only make an evaluation regarding the validity of the verdict.

In another case, the national court found the implementation of a foreign arbitration award to be contrary to E.U. competition law rules and denied it on the grounds of public order (*MDI v. Van Raalte case*)¹¹⁷. In the case, Van Raalte litigated against the arbitration verdict that it was faulty in the license contract with MDI and demanded reversal of the verdict in accordance with the related provisions of Denmark Law of Civil Procedure and New York Convention article V (2). Denmark Court of First Instance found the verdict to be contrary to article 101 on the grounds that exclusivity agreement included provisions regarding market share and concluded that public order was violated because of territorial restriction which could not benefit from exemption and which included a provision contrary to article 101¹¹⁸.

It is possible to see a similar approach in *Cytec v. SNF*¹¹⁹ verdict of Belgium Court of First Instance. The incident was a long-term supply agreement regarding acryl amide substance contracted between Cytec and SNF. In their verdict, arbitration board concluded that the main agreement between the parties had the characteristics of breaching article 101 of the Contract. Appellate Court which examined the verdict emphasized the legitimacy of arbitration judgement and stated that arbitration board was authorised to examine whether the agreement was valid or not and that arbitration award was a subsidiary review on their side.

In the light of the aforementioned verdicts, it is possible to say that examination within the scope of public order under the supervision of arbitration awards is seen as a supervision device in terms of the implementation of E.U. competition rules.

As a matter of fact today, absolute finality of arbitral awards are the main principle of arbitration judgement. The practical result of this is the fact that arbitration awards are not subject to review as a rule just like the verdict of a country’s court is not subject to appellate by court of last resort. Therefore, denial of the reversal or implementation of arbitration award will be in question in limited circumstances and the limitation of this review which is aimed at base consists of public order and *ultra petita*¹²⁰.

At this point, disputes over competition law rules which are accepted to be among mandatory rules and public order bring up the issue of to what extent review of arbitration awards must be made.

¹¹⁶ *SA Thales Air Defence v. GIE Euromissile*, CA Paris, 18-11-04, 2002/60932, (Komninos, A. “*Arbitration and Competition Law*”, University College London, Department of Law, (2008), p.38).

¹¹⁷ *Marketing Displays International Inc. V. VR Van Raalte Reclame B.V.*, Court Of Appeal Of The Hague, 24.3.2005, Case 04/694 and 04/695, (Idot 2008, 90).

¹¹⁸ By referring to *Eco Swiss* case, the Court stated that the main contract between the parties was anticompetitive prima facie since the product which is the subject of the contract was manufactured and sold in Benelux countries. Consequently, Danish Court concluded that arbitration award must be denied within the context of the provisions of the Convention.

¹¹⁹ *Societe SNF SAS v. Societe Cytec Industries BV*, 23.3.2006, Case 04/19673.

¹²⁰ Luca G. Radicati Di Brozolo, “Arbitration and Competition Law: The Position of the Courts and of Arbitrators”, 27, *Arbitration International*, Issue 1, (2011), p.21.

5.2.6 Application of Article 101(3) of TFEU by Arbitrators

Together with the inurement of Regulation no. 1/2003, a new period commenced in terms of block exemption authority, and the E.U. Commission was unauthorised regarding immunising¹²¹ and thus, the member country courts were granted to immunise. Following this regulation, whether arbitrators have individual immunising right or not has become a matter of discussion. The key issue is the direct applicability of competition law provisions¹²².

Another question is whether arbitrators are authorised to implement block exemption provision in 101(3) in terms of arbitrability of member countries competition law regulations. However, in the current situation there is not an approach that prevents arbitrators from individual immunising in the member countries¹²³. Although, there are some opposing views in the doctrine¹²⁴, it is thought that arbitrators that recognize goods and service market related to the dispute issue could resolve the issue better by evaluating individual immunising conditions especially complex economic proofs than general courts which do not have expertise¹²⁵.

To wrap up, disputes of arbitrality related to Article 101(3) is the most controversial side of arbitrability of competition disputes in E.U.

¹²¹ Besides, with Regulation no. 1/2003 (OJ L 1/1, 4.1.2003) the system in which parties could evaluate their situation in terms of the conditions in article 102 was started and thus the procedure of notifying for exemption was eliminated.

¹²² As per articles 101 and 102 of the Contract and the effects of The Commission verdicts in accordance with E.U. law are (*the principle of direct effect*). According to this effect related provisions and the Commission verdicts are binding upon member countries and national courts of these countries and are part of domestic laws of member countries. Another important principle for E.U. constitutional law is *the doctrine of supremacy*. According to this principle, E.U. law and E.U. competition law is superior to domestic laws of member countries and in case of a conflict with laws of member countries, E.U. law is implemented. According to the principle of inter-institutional collaboration, judicial offices are obliged to be in collaboration with the institutions of the Union. Finally, when E.U. competition law is considered, The Commission has supervisory judicial authority to the extent that behaviour which involves breach has an important effect in the domestic market and has the duty of ensuring correct implementation of E.U. competition law rules (*Commission as the guardian of the treaties*).

¹²³ According to Mourre, the authority foreseen with the aforesaid article bears a direct effect on arbitration courts that judge just like courts. Mourre, A. "Arbitrability of Antitrust Law from the European and US Perspectives", Kluwer Law International, (2010), p. 5, p. 47. For a similar view see : Landolt, P. "Modernised EC Competition Law in International Arbitration", Kluwer Law International, Netherlands., p.101, footnote 33.; Nazzini, R and Blanke, G. (Part I) , "Arbitration and ADR of Global Competition Disputes: Taking Stock (Part I)", G.C.L.R. Issue 1, (2008), p. 54-55. For discussions on whether arbitrators have the authority to provide individual exemption in disputes involving competition breach in member countries of E.U., see: Groot, G. D. "Arbitration and the Modernization of EC Competition Law", European Business Law Review (Special Edition) 19, no. 1, (2008), p. 175-189.

¹²⁴ See: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html , p. 134, (access date: 12.04.2014). For the comparative report of actions for compensation based on breach of EU competition law rules published in 2004 by the Commission.

¹²⁵ Blanke, G. , "Actions Under Articles 101 And 102 TFEU In International Arbitration", *SaLJ* 22, 539, (2009), p.551.

CHAPTER 6: Different Approaches in the Review of Arbitration Awards

6.1 General

Answers to the question of what the intensity of review would be in circumstances in which arbitration awards were reviewed within the context of public order have been searched in different verdicts for the last decade following the verdict of European Court of Justice in *Eco Swiss* case.

After *Thales* case, two different views have come out in the review of arbitration awards: maximalist approach and minimalist approach.

According to the maximalist approach, the primary thing is to review arbitration awards down to the last detail. The purpose is to supervise whether competition law is applied “correctly” or not¹²⁶. In order for the courts to make an effective evaluation, a tight control standard must be established¹²⁷. Re-examining arbitration awards completely and thus discovery is an inevitable result of extending arbitrability to competition law disputes according to the supporters of this view. Hereby, the danger of using arbitration to avoid competition law provisions will be eliminated.

The minimalist approach view the situation in terms of basic principles of arbitration law and bindingness of arbitration awards. According to this approach, reversal, recognition or denial of exequatur of the verdict as a result of the review of arbitration awards is possible in exceptional cases: a) the verdict’s causing gross and serious competition breach, b) ignoring E.U. competition law completely during the verdict making process although it is asserted by the parties manifestly¹²⁸.

For Brozolo, courts must be contented with whether arbitrators point out these issues or not and whether they resolve these issues sufficiently or not when encountering arbitration awards bearing competition law disputes¹²⁹. Another argument of the aforesaid approach is that supervisory national courts may not be as experienced as arbitrators in implementing E.U. competition law rules and they sometimes implement E.U. competition law rules defectively.

Except for *prima facie* mistakes, a review directs to the basis of the dispute which tarnishes the validity of a verdict (prohibition of re-examination of the cause of action-*révision au fond*)¹³⁰. So that, re-examining arbitration awards completely in the court will be contradictory to the purpose of arbitration judgement in the first place. For this reason, courts must be able to reverse a judgment when the foundations of public order are shaken. On the other hand, while Court of Justice was interpreting public order by considering the provisions of the Convention in *Eco Swiss* case, it preferred to integrate E.U. public order concept with related national concepts and interpreted international public order limitedly. Similar verdicts of the courts both in this case and after support the views of minimalist approach.

Practices regarding the review of arbitration awards show that minimalist approach finds approval among the national courts in the E.U.

¹²⁶ OECD, *Arbitration and Competition*, (2010), p.13, see: <http://www.oecd.org/daf/competition/abuse/49294392.pdf>, (access date: 25.04.2014)

¹²⁷ Luca G. Radicati Di Brozolo, “Arbitration and Competition Law: The Position of the Courts and of Arbitrators”, 27, *Arbitration International*, Issue 1, (2011), p.22.

¹²⁸ The general statements of Gordon Blanke

¹²⁹ Luca G. Radicati Di Brozolo, “Arbitration and Competition Law: The Position of the Courts and of Arbitrators”, 27, *Arbitration International*, Issue 1, (2011), p.21-26.

¹³⁰ Liebscher, C, “EU Member State Court Application of *Eco Swiss*: Review of the Case Law and Future Prospects” in Gordon Blanke and Phillip Landolt (eds), “EU and US Antitrust Arbitration”, Kluwer Law International, (2011), p.819, Komninos, A., “Arbitration and Competition Law”, University College London, Department of Law, (2008), p.38.
see :http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105 , (access date: 25.04.2014)

In conclusion, national courts deciding to reverse or deny the implementation of arbitration awards on the grounds of public order is allocated to the situation in which a problem related to competition law is ignored completely or causes an apparent and serious breach which affects the “*prima facie*” basis. In the light of these entire data, it can be said that the approach in review of arbitration awards sides with minimalist approach.

6.2 Arbitrator’s Collaboration with the Commission and Competition Authorities and the Commission’s role as *Amicus Curiae*

Review of arbitration awards by state courts should not be understood as an unlimited review. It may be thought that this review is to ensure arbitration awards’ compliance with laws. However, the risk is the possibility of seeing arbitration courts as a “pre-inspection authority” that is applied to before state courts.

At this point, in order to gain the advantages expected from arbitration judgement- especially in terms of arbitration awards in which disputes regarding competition law are discussed- the idea of collaboration between arbitration courts and the Commission is emphasized. For arbitration judgments, which include competition law disputes, collaboration with the Commission is a two-way discussion:

- Arbitrators demanding annotation about commitments of the Commission in the conditional permission verdicts in the merger or regarding the correct implementation of EU competition law provisions directly.
- The commission that is obliged to oversee the correct implementation of EU competition law provisions as per article 211¹³¹ of the Treaty delivering opinion qua amicus curiae¹³² to provide the correct implementation of commitments in the conditional merger permission verdicts (and thus public order).

As per article 15 (1) of Regulation no. 1/2003¹³³ courts of member countries have been granted to ask questions to the Commission directly regarding the implementation issues of articles 101 and 102. Also, courts have been charged with handing in one copy of the verdicts to the Commission regarding the cases in which articles 101 and 102 are implemented. As per article 15 (3)¹³⁴ of the Regulation, it was ensured that competition authorities of the member countries could notify in written to the courts to implement articles 101 and 102 at their own

¹³¹Article 211: In order to ensure the proper functioning and development of the common market, the Commission shall:

- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied, - formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary, - have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty,- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

¹³² The concept “amicus curiae” in terms of arbitration judgment is used to express the active or passive involvement of the Commission in an ordinary arbitration process regarding both commitments and EU competition law by maintaining a stance for arbitration courts (Nisser, C. and Blanke, G. “*Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings*”, *E.C.L.R.*, Issue 4, (2006), p. 174.).

¹³³ “In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.”

¹³⁴ “Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations. For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case”.

discretion. In this case, national competition authorities act as *amicus curiae*¹³⁵. However, the aforesaid provisions are not applicable to arbitration boards by grammatical interpretation¹³⁶.

According to the view that it would not be right to implement the duty of notifying orally or in written to arbitration judgement as per article 15(3) of Regulation, national competition authorities interfering with the arbitration process based on parties' freedom of will in terms of the law to be applied¹³⁷ would tarnish the principles of exclusivity, independence and trust¹³⁸. In the doctrine the pre-condition of the issue is the fact that parties of arbitration judgment must consent to the involvement of authorities in the first place¹³⁹.

The involvement of the commission or competition authorities may arise in these circumstances:

- One of the arbitration parties could have applied to the delegation and demand the involvement of competition authority in the process.
- 3rd party or parties whose interest could be affected via arbitration judgement could have applied to the competition authority directly.
- Competition authority may want to get involved in a current arbitration judgement to deliver an opinion or in another way.
- Arbitration board may demand to obtain written or oral information from the Commission.

If one of the parties asks for the interference of competition authority with arbitration judgement, the arbitration board have a choice. First, the arbitration board will resolve this demand positively or negatively and then decide whether interference of the authority will be allocated to procedural issues only or to the basis of dispute. At this point, independence from other querelas and the principle of parties' autonomy are in a way in conflict. It is stated that authority's interference in a case regarding the basis is accepted to tarnish the independence of arbitration judgment¹⁴⁰.

In addition to all these points, the arbitration awards are binding upon competition authorities under no circumstances even if the subject-matter and parties are the same. It is controversial to what extent competition authorities' verdicts on the same issue and parties would be binding upon arbitration board. In general, it is emphasized that competition authorities must consider the following points in their roles as *amicus curiae* in arbitration judgments:

- The involvement of competition authorities in arbitration process should not be contrary to the parties consent.

¹³⁵ Komninos, A. "Assistance by the European Commission and Member States Authorities in Arbitrations", Kluwer Law, The Netherlands, (2011), p. 734.

¹³⁶ Nazzini, R. "A Principled Approach to Arbitration of Competition Law Disputes: Competition Authorities as *Amicus Curiae* and the Status of Their Decisions in Arbitral Proceedings", EBLR Special Edition, (2008), p.103.

¹³⁷ At this point, what must not be overlooked is the fact that the Commission may demand documents necessary for the determination of whether there is always a contract, decision or action which restricts competition within the extent of the Commission's administrative powers.

¹³⁸ Komninos, A., "Assistance by the European Commission and Member States Authorities in Arbitrations", Kluwer Law, The Netherlands, (2011), p.739.

¹³⁹ Komninos, A. Blanke, G. and Landolt, P. "Assistance by the European Commission and Member States Authorities in Arbitrations", *EU and US Antitrust Arbitration*, (Eds.), Kluwer Law International, Alphen aan den Rijn, (2011), p. 739, Nazzini, R. "A Principled Approach to Arbitration of Competition Law Disputes: Competition Authorities as *Amicus Curiae* and the Status of Their Decisions in Arbitral Proceedings", EBLR Special Edition, (2008), p.108.

¹⁴⁰ Nazzini, R. "A Principled Approach to Arbitration of Competition Law Disputes: Competition Authorities as *Amicus Curiae* and the Status of Their Decisions in Arbitral Proceedings", EBLR Special Edition, (2008), p.107.

- In cases in which parties do not have valid consent, arbitration board must apply to the authorities only when there is the risk of reversing the judgment or such interference must be allowed.
- Written or oral involvement of the authority in the arbitration process must be limited to arbitrators' making applicable verdicts.
- Principles of confidentiality and equality of the parties should not be breached during the interference of the authorities.
- Competition authorities are not bound to arbitration award even when the issue and parties are the same. However, arbitrators are obliged to consider the previous authority verdicts to make applicable verdicts.

Involvement of a competition authority with a present arbitration judgement (for example by choosing the arbitrator when necessary) or supervision of judgement could occur especially when conditional merger verdicts are given commitment.

CHAPTER 7: Conclusion

Hence, what is the role of arbitration in competition law and what are its limits? Arbitration as a traditional means of dispute resolution dates back to old times. Arbitration, which was previously used in resolution of interpersonal disputes, has been institutionalised with the increase of international trade.

Parties will of freedom is the basis of parties, yet it is seen that this freedom has some limitations. States have determined the limits of arbitrability in their domestic regulations regarding procedural law. In this process the more states interfere with arbitration judgment, the more limited field are arbitrable. Property ownership is also arbitrable in many countries which have accepted wide arbitrability norms.

A closely related concept with arbitrability is public order. Public order could be accepted as being the body of values that states have created from their past accumulations. New York Convention, which is one of the arbitration regulations that has the highest participation, has arranged that in issues which are thought to be a part of public order in countries' domestic laws the implementation of arbitration awards could be denied. Therefore, countries' understanding of public order has been described as a cause for reversing a judgment in terms of arbitration awards.

In the U.S., which is one of the most experienced countries in arbitration, demands originating from competition law have started to be accepted as arbitrability together with *Mitsubishi* verdict. In this verdict “*second look*” doctrine which has affected following verdicts in the U.S. has been justified. With this doctrine, it has been stated that competition law disputes are eligible to arbitration and that court review is a guarantee of this eligibility.

After this step the way arbitrators authority in terms of competition law is perceived has been parallel with courts attitude towards this issue. These discussions in E.U. competition law gone down to the fact that courts must only interfere with arbitration awards when they see obvious “breach of competition”. According to this view, the existence of such a breach may be a cause that impedes public order. In *Eco Swiss* case, which is among the verdicts that has directed E.U. competition law, Court of Justice stated that review of arbitration awards must be limited and pertain to exceptional cases.

Discussions regarding the implementation of E.U. competition law rules by judicial authorities have taken on another dimension with the Regulation no. 1/2003. The fact that exclusive authority of the Commission in recognising individual exemption has terminated and the courts have been granted to provide exemption initiated discussions on the fact that arbitrators also have this authority tacitly.

Another significant implication of arbitration in the E.U. is the fact that arbitration has been included in terms of supervision of the implementations of commitments in the Commission's conditional merger verdicts. The Commission has come to the fore in supervision of merger processes via arbitration. In this sense, it can be said that competition law and arbitration judgement has two concurrent points:

- Arbitration in which individuals (arbitrators in arbitration judgment) or arbitration institutions implement competition law as private law sanction.
- Arbitration as a subsidiary tool in implementation of public law by competition authorities.

The first one constitutes majority of arbitration cases regarding competition law. Here, arbitrators' function is the transfer of the damage caused by the party that violated competition rules to the other party ex post. Arbitrators contribute to the implementations of

ex-ante competition authorities in conditional permission verdicts included in arbitration resolution.

Because of its nature, arbitration is precious, even the parties will need courts to enforce the arbitration agreement and arbitral awards. International trade and investments among states and private companies are increasing, so demands making international commercial arbitration more effective. A solution for this is to reform the national statutes on arbitration and make the national courts to support the arbitral process. Indeed, without this, arbitration will remain ineffective, particularly in developing economies.

So, what are the advantages of arbitration in competition law? The advantages gained from arbitration are obvious and they are well known by its practitioners. A benefit of the arbitration is that arbitration provides better framework and legal ground for both parties. If the parties are different from each other in line with their culture, experiences and backgrounds or geographical places, arbitration provides a compromise place.

There are many advantages of arbitration over litigation in the courts. Firstly, arbitration allows parties to keep their dispute private. The final award is not accessible to third parties. The hearing does not take place in a formal place of a courtroom unlike litigation, where the claim form is a public document and mostly a party can not use public interest attracted in this way in order to support its case.

Secondly, parties have the chance to choose their own arbitration rules and procedures. So, it is significant that parties can make an accurate contract. For this reason, there are some institutions (e.g. International Chamber of Commerce (ICC) and United Nations Commission on International Trade Law (UNCITRAL) who have already made fair and commercially acceptable rules. So that, parties do not have to spend much time for preparing contracts and they can easily modify ready-made ones. On the other hand, this possibility does not exist in the court litigation whose rules are mainly inflexible.

Moreover, in arbitration, there are mainly softer rules than the court litigation that parties do not have to disclose all the documents and it leads cost less. As a result of this, unlike in the court may happen, parties do not need to reveal all important documents and information to other parties.

Furthermore, parties can assign more than one arbitrator. The assigned arbitrators can also assign other arbitrators. As a consequence, in arbitration, there are likely more experts who have better qualification and experiences that may not be found in the ordinary courts. It is an important fact to find solutions for commercial disputes.

Besides, thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, one of the main advantages of arbitration is the ease of enforcement of an arbitration award. The Convention's 1st article states: "*This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.*" And at article 3 says: "*Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon*". Article V of the New York Convention indicates that the recognition or enforcement of a Convention award may be declined only if the party against whom the award is invoked can prove the existence of one or more of a number of specific defences. The New York Convention has currently been signed by more than 120 countries, as a result of this, arbitration awards have greater recognition in the world than many national court decisions.

In the light of these advantages, parties should take into account some facts regarding arbitrating disputes involving competition law when they make an arbitration agreement. First of all, they should settle the arbitration as a clause which covers all possible disputes, especially if boilerplate provisions are used. Hence, it should be obvious in the agreement that arbitration clause should cover all the disputes that may occur between the relation and claims of the parties. Secondly, the parties should choose the arbitral rules and arbitrators carefully. It provides crucial benefits for the parties if a dispute arises. Also, parties should consider the different procedures between the litigation and arbitration process. For instance, obligations such as disclosure can be different in a national court which can cause results that parties do not actually wish. Finally, if a dispute arises, parties should seek other applicable competition laws that can assist their dispute to assure their agreed substantive law.

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